

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JERRY ARIAS-AGRAMONTE,

Petitioner,

- against -

COMMISSIONER OF INS,

Respondent.

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00 Civ. 2412 (RWS)

O P I N I O N

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**Sweet, D.J.,**

Petitioner Jerry Arias-Agramonte ("Arias") seeks a writ of habeas corpus directing relief from an order of removal issued pursuant to proceedings commenced by the Immigration and Naturalization Service ("INS"). For the reasons set forth below, the petition will be granted.

### **Background and Prior Proceedings**

Arias was born on October 19, 1951, in San Cristobal, in the Dominican Republic, of which he is still a citizen. He came to the United States as a teenager on June 15, 1967, when he was admitted as a lawful permanent resident. He settled in New York City and eventually married.

In October, 1977, he was arrested after a police raid on a restaurant revealed him to be in possession of a marked \$50 bill which had been used in an undercover drug buy-and-bust operation. Arias pled guilty to a charge under New York law of criminal sale of a controlled substance in the fifth degree. He received a sentence of two years' probation.

Late in 1998, Arias's father, a United States citizen and

resident, passed away. The father wished to be buried in the Dominican Republic, and Arias and other family members traveled to the Dominican Republic for the funeral. On December 1, 1998, Arias returned to the United States, arriving at John F. Kennedy airport in New York City. He was detained by INS and charged as inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act of 1952, as amended (the "Act"), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (Supp. IV 1998), as an alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any controlled substance. Although a resident of New York City (the Bronx), and although initially detained at John F. Kennedy airport in New York City, Arias was immediately transferred to the INS detention facility in York, Pennsylvania, where he has been ever since.<sup>1</sup>

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<sup>1</sup> This case presents facts substantially similar to those found in Velasquez v. Reno, 37 F. Supp.2d 663 (D.N.J. 1999), in which the petitioner, Velasquez, had traveled to Panama to visit his mother during her hip-replacement surgery and was taken into INS custody at the airport upon his return to the United States. See id. at 664. Based on a 1980 conviction for conspiracy to sell cocaine, for which he was sentenced to probation and a fine, Velasquez was charged by the INS with removal under the same provisions as Arias has been charged in the instant case: 8 U.S.C. § 1182(a)(2)(A)(i)(II), 1182(a)(2)(C). See Velasquez, 37 F. Supp.2d at 664-65. Interestingly, the Government in Velasquez "concede[d] that a case cannot be imagined with less sympathetic facts for the position they espouse." Id. at 664. It seems, however, that neither the Government nor the Velasquez court was possessed of a particularly powerful imagination. As the facts surrounding Arias's detention should make clear, the instant case presents a situation even less sympathetic to the Government's position.

In connection with the circumstances of Velasquez's detention, which seem to have been indistinguishable from those of

At an INS hearing on December 21, 1998, counsel for Arias raised the issue of posting a bond for Arias's release on bail. The presiding Immigration Judge ("IJ") indicated his opinion that he lacked authority to grant bail, and counsel, who at that time had not yet had opportunity to review Arias's records, declined to press the issue. It was agreed that the issue would be addressed

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Arias, the Velasquez court noted:

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") [Pub. L. No. 104-208 (1996)], petitioner's brief trip abroad may not have necessitated a new request for admission into the United States and the bars on admissibility found in 8 U.S.C. § 1182(a), which were generally applied to aliens seeking entry for the first time, may not have applied. See Rosenberg v. Fleuti, 374 U.S. 449, 462, 83 S. Ct. 1804, 10 L. Ed.2d 1000 (1963) (holding "that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return"). The IIRIRA replaced the definition of "entry" with a new definition of "admission" such that the INS now treats lawful permanent residents who have committed a crime enumerated in 8 U.S.C. § 1182(a)(2) as making a new application for admission even when returning from a brief trip abroad. See 8 U.S.C. § 1101(a)(13)(C) (West Supp. 1998); see also In re Collado, Int. Dec. 3333, 1998 WL 95929 (BIA 1998) (stating that judicial doctrine of Fleuti did not survive the enactment of the IIRIRA and, under 8 U.S.C. § 1101(a)(13), a returning lawful permanent resident who has committed an offense identified in 8 U.S.C. § 1182(a)(2) "shall be regarded as 'seeking an admission' into the United States, without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the Fleuti doctrine"). Velasquez, 37 F. Supp.2d at 665 n.2.

at the next hearing date, set for January 4, 1999.<sup>2</sup> However, the bail issue does not appear to have been raised, either at the January 4 hearing or at any time thereafter.

At the January 4, 1999 hearing, Arias sought to withdraw his application for admission to the United States. The IJ granted the request, reasoning that the equities of the situation favored Arias and that granting the withdrawal would enable Arias to return to the Dominican Republic and apply for admission to the United States at some point in the future when, perhaps, the regulatory regime would be more favorable to Arias. AR 111.

Subsequently, Arias substituted counsel. His new counsel filed a motion to reopen and reconsider, which the IJ granted. After a hearing held on four dates between March 17, 1999 and July 9, 1999, at which Arias and several other individuals testified and

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<sup>2</sup> While the IJ cited a Board of Immigration Appeals ("BIA") decision under which he concluded he did not have the authority to grant bail, the court reporter did not hear the citation, so it is listed as "indiscernible" in the transcript of the hearing. Administrative Record of Proceedings, p. 100 (Exh. A to Government's Letter Brief dated June 2, 2000) (hereinafter "AR"). It is possible that the IJ relied on 8 U.S.C. § 1226(c) in reaching his conclusion. As interpreted by the BIA (although subsequent to the IJ's determination here), "Consistent with Congress' mandate, the regulations implementing section 236(c) of the Act [codified at § 1226(c)] remove from Immigration Judges the jurisdiction to entertain requests for release, on bond or otherwise, from criminal and terrorist aliens described in its provisions who do not fall within the exception." In re Joseph, 1999 WL 271357, BIA (April 23, 1999).

were subject to cross-examination and documentary evidence was introduced, the IJ granted Arias's application for relief from removal under former section 212(c) of the Act, 8 U.S.C. 1182(c) ("212(c)"). In his oral decision issued on July 9, 1999, the IJ made the following statements, among others:<sup>3</sup>

It is hard to find a case that has more merits, both with respect to the wrong done by the respondent on the one hand, and the equities of the respondent on the other. The respondent has testified, and the Court has not reason to doubt him and has plenty reason to believe him [sic], that he was in a restaurant. Somebody asked to change a \$50 bill. He changed the bill for something smaller for somebody. And it turns out that the \$50 bill was a marked bill that had been part of a drug transaction. Now, it is well-settled that the Court cannot go behind the record of conviction to find that a person is not in fact removable when the record of conviction would show that the person is, and this Court does not do that... . Nonetheless, this does not mean that honest, straight-forward testimony regarding the underlying facts cannot necessarily contradict the fact of a conviction for purposes of relief only (i.e., not for purposes of deportability or removability). In this case, the respondent was subject to cross-examination. There were no questions relating to this issue on cross-examination. The Court finds the respondent's testimony credible for several reasons. First, his demeanor struck the Court as that of a person speaking sincerely and from the heart. Secondly, the respondent has no other convictions in the United States or elsewhere that have been brought to the Court's attention, indicating a lack of pattern of either criminal behavior or drug-related behavior. There has been no evidence that the respondent ever used or participated in the sale of drugs except for one conviction. And, in addition, the respondent has been part of an upright family and has himself behaved in an upright manner both before and after this conviction,

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<sup>3</sup> The IJ is quoted at length because, as the trier of fact who actually conducted an extensive hearing, his conclusions carry substantial weight.

working hard, taking care of his family, surmounting obstacles, and otherwise comporting himself according to the law. The Court gives great weight to the respondent's testimony in measuring the severity of the conviction, which it must accept for purposes of the respondent's removability. But, it weighs this conviction fairly lightly in terms of his request for relief.

His equities are unusual and outstanding. He has been a resident for 30 years. His mother is present here. His siblings are present here. It appears that most are United States citizens. His only purpose for leaving the United States was to attend the funeral of his father. He has six U.S. citizen children, four of whom live with him. The two that do not live with him include children that he has been close to his whole life. One, Jerry Jr., who is in the military and has submitted a letter asking the Court not to deport his father. The other, Jason, suffers from heart disease and has undergone two heart operations. And the testimony here was that he may need a heart transplant. He lives with his common law wife and two of his other four children in New York City (two of the other children live in Florida). His mother is a citizen of the United States. His sister, Carmen, who gave testimony here, has been a citizen of the United States for some 15 years. He has a brother, Rafael, who is a citizen of the United States, and a brother, Jose, who is a citizen of the United States. Another brother, Matias, who is a lawful permanent resident of the United States. All here in the United States. He has only one half brother in the Dominican Republic who is not a resident of the United States.

The respondent has worked hard and apparently worked honorably. He has submitted income tax forms for the past four years. He has submitted to the Court letters and documents showing his licensure by the State of New York to deal with motor vehicles. He has submitted two letters from administrative law judges and a letter from the chief administrative law judge dealing with traffic cases in New York. They make comments describing the "invaluable assistance as a Spanish interpreter to countless motorists who have appeared before me for trial. He routinely forgave the payment of fees for services when motorists weren't able to pay or when a judge requested his assistance. Because of his skill, patience, and generosity, Jerry contributed immensely to

the fair hearing in which he participated." One of the other letters from the administrative law judge mentions that the state requires people to provide their own interpreters for proceedings in the traffic court. He was well-regarded by the staff who came in contact with him, according to the Chief Administrative Law Judge, Larry Waldman. One of the judges "recommend[s] that you give him whatever courtesies you are authorized to extend." And another states "the judge's staff and Jerry's colleagues are united in their hope that Jerry's case will be resolved in a positive way so he may continue to remain in this country which he has grown to love and regard as his own. Notwithstanding the fact of Jerry's ill-advised and unfortunate encounter with the law in 1978, we pray that Your Honor will give great weight to the exemplary life which Jerry has lead since and render a favorable decision in Jerry's case and give this kind, gentle man a second chance," letter of Marcelle Blanc.

Letters of support from the respondent's family and friends also indicate and corroborate his testimony that he loves his family, he is close to his family. His family includes not only his wife and children, but includes his mother and brothers and sisters. He is close to all of them. They depend on him together as a family. He has only the one brother in the Dominican Republic.

There is no doubt in the Court's mind that the respondent has been rehabilitated and that no purpose would be served for the United States by punishing a man who was given probation in the first place 20 years ago and has had no other infractions of the law since then. Nothing would be accomplished of benefit to the United States and much would be lost. The bitterness that would be natural towards the Government in such a circumstance is something that we do not need to create. The apparent injustice of changing the rules of the game 20 years after the game finished is something that can be avoided. The need for the respondent to be present for his children so that they do not grow up in a home without a father is an obvious need and something the people of the United States will obviously benefit from. These people include not only his children, but his children's neighbors and society in general. There is generally a high correlation between social problems and the lack of a father or other male parent figure in a home and there

is no need to create such a travesty in this case for no good purpose. The Court finds the respondent's equities outstanding and unusual. They clearly outweigh the harm, if any, of his actions that lead to a guilty plea in conviction. And it would be a great injustice not to grant him a second chance by means of a 212(c) waiver.

AR 87-91.

The Government appealed the IJ's decision to the BIA. As Arias was not released from detention while the appeal was pending, Arias's counsel applied on August 17, 1999 to the Philadelphia District Director of INS ("Philadelphia District Director") for Arias's parole. The application was denied by the District Director on September 20, 1999 in a letter which stated in part:

The foundation of your request for parole is based upon the assertion that Mr. Arias is no longer a danger to the community because his conviction was an isolated incident. You also assert that he became an upstanding individual since his conviction. This does not outweigh the seriousness of his criminal conviction. Based upon his criminal conviction and the nature of his arrest, it is deemed that he presents a continuing danger to the safety of the public and community.

In light of the above and after reviewing the facts of this case, I have considered whether Mr. Arias should be paroled under other regulations or policies. However, I can find no provision which would provide for his release, nor is there any information in your letter ... upon which I can conclude that his continued detention is not in the public interest. Furthermore, you have not demonstrated that his release is of urgent humanitarian reasons or significant public benefit as outlined in 8 C.F.R. § 212(5)(a) of the Act. Therefore, I have determined that Mr. Arias will remain in custody until

the conclusion of his removal proceedings.

On February 3, 2000, the BIA reversed the IJ, holding that 212(c) relief is no longer available to aliens who, like Arias, have been convicted of an aggravated felony, which is defined by the Act to include any illicit trafficking in a controlled substance. See 8 U.S.C. § 1101(a)(43)(B). The BIA held that Arias was removable from the United States and was not eligible for any form of relief from removal.

Arias thereafter filed a motion to reconsider and for a stay of removal with the BIA. The request for a stay was denied on March 3, 2000, and the motion to reopen and reconsider was denied on April 21, 2000.

On March 30, 2000 Arias submitted to the Southern District of New York a petition for writ of habeas corpus, which was assigned to this Court and received on April 2, 2000. The habeas petition, which named as respondent only the Commissioner of INS, seeks Arias's immediate release on a \$5,000 bond and a determination that he is eligible for a hearing to seek a waiver of deportation under 212(c) before an immigration judge.<sup>4</sup> By order to

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<sup>4</sup> Judging from the wording in the actual Petition for Writ of Habeas Corpus, it would appear that Arias's counsel overlooked the fact that Arias has already had a 212(c) hearing before the IJ, who, as set forth above, granted Arias relief from deportation.

show cause received by the Court on April 3, 2000, Arias also sought a stay of deportation pending resolution of the merits of his petition. The order to show cause was made returnable on April 26, 2000, and a stay was entered.

In a letter submission and at oral argument, the Government contended that this Court lacked jurisdiction to hear the petition because the Commissioner of INS was not the proper respondent for the petition, the proper respondent being the Philadelphia District Director, over whom this Court allegedly lacked personal jurisdiction. As an alternative to a finding of lack of personal jurisdiction, the Government also contended that the case should be transferred to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404, for improper venue.

In an Order dated May 3, 2000, this Court held that it had personal jurisdiction over the Commissioner of INS, on the basis of reasons which would be set forth in greater detail at a later date and were analogous to the reasons set forth in Henderson

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See Petition ¶ 11 ("The Petitioner qualifies for a hearing to seek a waiver of deportation before an Immigration Judge under § 212(c) of the INA. . . ."). In the Memorandum of Law filed in support of the Petition, however, Arias's counsel correctly states that the IJ granted 212(c) relief, and urges the Court to hold that it was proper for the IJ to do so. (Mem. L. in Supp. at 18.) Consequently, the Court will construe the petition as seeking a writ releasing Arias on the grounds that the BIA was incorrect as a matter of law in holding that Arias was ineligible for 212(c) relief.

v. INS, 157 F.3d 106, 125-28 (2d Cir. 1998), cert. denied, 119 S. Ct. 1141 (1999); Pottinger v. Reno, 51 F. Supp.2d 349, 356-57 (E.D.N.Y. 1999); and Mojica v. Reno, 970 F. Supp. 130, 166-67 (E.D.N.Y. 1997). The Order also noted that, pursuant to the same authorities, personal jurisdiction over the United States Attorney General would also be proper if the Attorney General were to be named as a defendant in this action. The request to transfer venue was likewise denied.

The Order directed the Government to serve its response to the merits of the petition by June 2, 2000. Reply papers from Arias were to be served by June 6, 2000. Oral argument before the Court on the merits of the petition was held on June 7, 2000. Arias's removal was stayed pending resolution of the petition.

In the Government's response and at oral argument, the Court was asked to defer consideration of the petition and to place it on the Court's suspension docket pending resolution of a trilogy of cases which have recently been argued in the Second Circuit and which will resolve issues that may prove dispositive here. See Calcano-Martinez v. INS, No. 98-4033 (2d Cir. filed Jan 29, 1998) (connected with Madrid v. INS, No. 98-4214 (2d Cir. filed June 4, 1998); and Khan v. INS, No. 98-4246 (2d Cir. filed June 29, 1998)) (collectively, "Calcano-Martinez"); see also St. Cyr v. INS, No.

99-2614 (2d Cir.) (appeal filed by Government from adverse habeas corpus decision).

## **Discussion**

### **I. The Court Will Not Defer Consideration of the Petition**

The Government has requested that this Court place on its suspension docket this petition, as the petition raises three issues currently pending in the Second Circuit in the Calcano-Martinez and St. Cyr appeals. These issues are: (1) the extent to which the Act as amended by IIRIRA bars judicial review of removal orders issued against specified categories of criminal aliens, such as Arias, including whether jurisdiction to hear certain questions of law survives the jurisdictional bar; (2) whether judicial review over any challenges that survive the jurisdictional bar is channeled exclusively to the circuit courts on direct petition for review or may be brought by habeas corpus petition under 28 U.S.C. § 2241 in district court; and (3) whether section 212(c) relief is available to aliens in removal proceedings whose criminal conduct preceded IIRIRA's effective date.

This Court has previously placed on its suspension docket two habeas petitions by aliens seeking relief from deportation

pending the Second Circuit's decision in Calcano-Martinez. See Gutierrez v. Reno, No. 99 Civ. 11036 (RWS) (S.D.N.Y. Order dated Apr. 13, 2000); Henriquez v. Reno, No. 99 Civ. 8656 (RWS) (S.D.N.Y. Order dated Jan. 25, 2000).

In those instances, however, the Government's requests to place the petitions on the suspension docket were unopposed. More importantly, the placement of those petitions on the suspension docket is not likely to have any adverse effect on those petitioners. In Henriquez, the petitioner is not detained by INS but is working and living with his family in the Bronx. In Gutierrez, the petitioner had pled guilty in New York State Supreme Court on May 5, 1998 to criminal sale of crack cocaine and is currently serving two consecutive sentences of imprisonment of one to three years. Because it is likely that the Second Circuit's decision in Calcano-Martinez will be made before Gutierrez has finished serving his sentences, he is not likely to be adversely affected by the suspension of his petition.

By contrast, Arias has spent the last nineteen months at the INS detention facility in York, Pennsylvania, where he would remain -- barring the extremely unlikely possibility of his release on parole upon re-application to the Philadelphia District Director -- if this Court placed his habeas petition on the suspension

docket. In addition, Arias, unlike Henriquez or Gutierrez, has already been granted 212(c) relief by an IJ after a prolonged evidentiary hearing. Finally, resolution of the merits of Arias's petition, on the basis of the facts and legal analysis set forth in this opinion, may be of interest or of use to the Second Circuit while it deliberates in Calcano-Martinez.

For these reasons, the Court will not defer consideration of the merits of Arias's petition.

## **II. The Court Has Personal Jurisdiction Over the Commissioner of INS**

As set forth above, by Order dated May 3, 2000, the Court determined that it had personal jurisdiction over the respondent, the Commissioner of INS. The Order indicated that the reasons for this determination would be given "at a later date." The reasons are thus set forth below.

A writ of habeas corpus is directed to the custodian of a detainee, and a writ may not issue where a court lacks personal jurisdiction over the custodian. See 28 U.S.C. § 2243 ("The writ, or order to show cause[, ] shall be directed to the person having custody of the person detained."). The Government contends that a detainee's custodian is the official in charge of the facility that

has day-to-day control over the detainee, and who can "produce the actual body." Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994); see also Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir. 1986). The Government further contends that the Philadelphia District Director is the official with day-to-day control over Arias, and that this Court lacks personal jurisdiction over the Philadelphia District Director, whose office is located in Philadelphia and who conducts his business in Pennsylvania.

By contrast, Arias contends that the Commissioner of INS also has custody over Arias and that this Court has personal jurisdiction over the Commissioner.

"The habeas statute does not 'specify who the person having custody will be,' nor does it state that there may be only one custodian." Mojica, 970 F. Supp. at 166 (quoting Nwankwo v. Reno, 828 F. Supp. 171, 174 (E.D.N.Y. 1993)); accord Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998). "Historically, the question of who is 'the custodian,' and therefore the appropriate respondent in a habeas suit, depends primarily on who has power over the petitioner and . . . on the convenience of the parties and the court." Henderson, 157 F.3d at 122.

The Government is correct that, as a general rule, the

official with day-to-day control over the petitioner is the custodian for habeas purposes. See id. (citing Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir. 1986); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 948 (2d Cir. 1976); Sanders v. Bennett, 148 F.2d 19, 20 (D.C. Cir. 1945)). Yet "the great majority of habeas cases . . . involve prisoners held in penal institutions," Henderson, 176 F.3d at 122, not in INS detention facilities.

In Nwankwo v. Reno, the Attorney General was held to be a proper custodian of an alien detained in an INS facility because the Attorney General could "direct her subordinates to carry out any order directed to her to produce or release the petitioner." Nwankwo, 828 F. Supp at 174; accord Mojica, 970 F. Supp. at 166; Vasquez v. Reno, 97 F. Supp.2d 142, 148-51 (D. Mass. 2000). The same rationale is applicable to the Commissioner of INS: she can direct the various District Directors to carry out her orders through the chain of command. See 8 C.F.R. §§ 2.1, 100.2;<sup>5</sup> Jean v.

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<sup>5</sup> Regulation 2.1 states:  
Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Executive Office, the Board, the Office of the Chief Special Inquiry Officer, and Special Inquiry Officers, there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General, and may redelegate any such authority to any other officer or employee of the Service.  
8 C.F.R. § 2.1. Regulation 100.2 establishes the hierarchical

Nelson, 727 F.2d 957, 966 n.7 (11th Cir. 1984) ("[i]n practice, the Attorney General's authority is delegated to the Commissioner of the INS. . . .") (citing 2 K. Davis, Administrative Law Treatise § 8:10 (2d ed. 1979)).

Other courts in the Southern and Eastern Districts of New York have rejected Nwankwo. See, e.g., Guerrero-Musla v. Reno, No. 98 Civ. 2779 (HB), 1998 WL 273038 (S.D.N.Y. May 28, 1998) ("weight of authority supports the view that the petitioner's custodian is the official in charge of the facility that has day-to-day control of the detainee") (citing Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994); Brittingham v. U.S., 982 F.2d 378, 379-80 (9th Cir. 1992); Eltayeb v. Ingham, 950 F. Supp. 95, 98 (S.D.N.Y. 1997); Carvajales-Cepeda v. Meissner, 966 F. Supp. 207, 208 (S.D.N.Y. 1997); Wang v. Reno, 862 F. Supp. 801, 812-13 (E.D.N.Y. 1994)).

The Second Circuit has recently addressed the question -- at least with regard to the Attorney General but not the Commissioner of INS -- in dicta but refrained from holding on it.

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structure of INS, with the Commissioner of INS at the top. See 8 C.F.R. § 100.2(a). District directors are subject to the general supervision of their respective regional directors, who in turn answer to the Executive Associate Commissioner for Field Operations, who answers to the Deputy Commissioner of INS, who answers to the Commissioner of INS. See id. § 100.2(b),(d).

See Henderson, 157 F.3d at 122.<sup>6</sup> Instead, the Henderson court certified to the Court of Appeals of New York the question of whether the New York long-arm statute, N.Y. C.P.L.R. § 302, established personal jurisdiction over the New Orleans INS District Director under the facts of the cases consolidated in the Henderson appeal. See Henderson, 157 F.3d at 124. Because the decision of the New York Court of Appeals could have been dispositive on the issue, the Henderson court did not reach the question of whether the Attorney General was an appropriate respondent. However, as summarized in a subsequent case:

The New York Court of Appeals decided not to answer the certified question. See Yesil v. Reno, 92 N.Y.2d 455, 682 N.Y.S.2d 663, 705 N.E.2d 655 (1998). It stated:

Without implying any view on the availability of CPLR 302(a)(1) as the proffered jurisdictional

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<sup>6</sup> The parties have not cited any case, nor is this Court aware of one, in which the appropriateness of naming the Commissioner of INS has been considered directly. It is fairly common for § 2241 habeas petitions seeking relief from orders pertaining to removal or deportation to name multiple respondents, including the district director of the facility where the petitioner is detained or from which he has been paroled or released on bond, the Commissioner of INS, and the Attorney General. See, e.g., Mojica, 970 F. Supp. 130; Henderson, 157 F.3d 106 (appeal of Yesil v. Reno, 958 F. Supp. 828); Pottinger, 51 F. Supp.2d 349. It is not clear why the Attorney General has not been named as a respondent here. Although the Court, in its Order issued on May 3, 2000, noted that the Attorney General would be an appropriate respondent if she were named as such, Arias's counsel has not, apparently, amended the petition to name as an additional respondent Attorney General Janet Reno. Nevertheless, as set forth below, the analysis does not differ in any significant respect when considering the Commissioner of INS as opposed to the Attorney General.

predicate with respect to the individuals and circumstances involved in this case, we note our uncertainty whether the certified questions can be determinative of the underlying matters. Alternative possibilities for obtaining jurisdiction, flowing from other potential Federal and State sources, seem far reaching.

Id. Meanwhile, the Supreme Court denied the government's petition for certiorari in Henderson. See Navas v. Reno, 526 U.S. 1004, 119 S. Ct. 1141, 143 L. Ed.2d 209 (1999) (denying certiorari in companion cases of Navas v. Reno and Yesil v. Reno). The Second Circuit then requested additional briefs from the parties on the point of personal jurisdiction. Prior to submitting briefs to the court of appeals, the parties settled. The Second Circuit then granted their joint motion to withdraw the appeal with prejudice, leaving unresolved the personal jurisdiction issue. Yesil v. Reno, 175 F.3d 287 (2d Cir. 1999).

Pottinger v. Reno, 51 F. Supp.2d 349, 357 (E.D.N.Y. 1999).

However, while the Henderson court felt it "ought not decide unnecessarily" this "highly complex issue," it did devote several pages to a discussion of the issue, setting forth the pros and cons of holding that the Attorney General would be a proper respondent. See Henderson, 157 F.3d at 124-28. It is not necessary to restate those deliberations here. This Court concludes that the reasons supporting a finding that the Attorney General would be an appropriate respondent outweigh the reasons opposing such a finding. In particular, what appears to be the most serious concern of the Government -- that petitioners would be able to file petitions anywhere in the United States and would

thereby be able to engage in impermissible forum-shopping -- can be, and should properly be, managed through a venue analysis. See id. at 127; Vasquez, 97 F. Supp.2d at 151 ("A venue analysis would quickly disarm any potential abuses of the system."). Also, as the Mojica court stated:

It is important to note that were the government correct that a habeas petition may be heard only where the petitioner is detained, then the Attorney General "could seriously undermine the remedy of habeas corpus by detaining illegally a large group of persons in one facility so that the 'resulting torrent of habeas corpus petitions' would overwhelm" the local court.

The laws of the state of New York allow for service of process over ... Mojica's custodians... . Mojica is a longstanding resident of New York with substantial ties to this state. Among other things, both his family and attorneys reside and transact business here... . The personal jurisdiction requirement is satisfied. The Attorney General may not frustrate the courts and negate the Great Writ by moving prisoners around the country.

Mojica, 970 F. Supp. at 167; accord Pena-Rosario v. Reno, 83 F. Supp.2d 349, 362 (E.D.N.Y. 2000), reconsideration denied 2000 WL 620207 (May 11, 2000); Vasquez, 97 F. Supp.2d at 150; Pottinger, 51 F. Supp.2d at 357.

It is necessary to add that the Commissioner of INS is an appropriate respondent. She clearly transacts business in New York, and can therefore be reached by service of process. See Mojica, 970 F. Supp. at 167 (quoting Nwankwo, 828 F. Supp. at

175, and citing N.Y. C.P.L.R. § 301 for the proposition that "service reaches non-domiciliary who regularly transacts business in New York State, even if the cause of action has no connection to the state"). While Mojica and Nwankwo specifically contemplated jurisdiction over the Attorney General, the reasoning, as mentioned above, is equally applicable to the Commissioner of INS.

### **III. Venue Is Proper in the Southern District of New York**

Where, as here, venue is not fixed by statute, courts apply "traditional venue considerations" in a habeas proceeding. See Mojica, 970 F. Supp. at 167 (citing Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 493, 93 S. Ct. 1123, 1128-29, 35 L. Ed.2d 443 (1973); U.S. ex rel. Sero v. Preiser, 506 F.2d 1115, 1130 & n.11 (2d Cir. 1974) (appropriateness of habeas venue in New York "bolstered" by analogy to section 1391(e) which looks to residence of plaintiff); Nwankwo, 828 F. Supp. at 176 & n.2). These traditional considerations include "(1) the location where the material events took place, (2) where records and witnesses pertinent to the claim are likely to be found, (3) the convenience of the forum for respondent and petitioner, and (4) the familiarity of the court with the applicable laws." Id. (citing Braden, 410 U.S. at 493-94, 93 S. Ct. at 1128-29).

In the instant case, these considerations weigh strongly in favor of a finding that venue in the Southern District is appropriate. The events material to this petition all took place in the Southern or Eastern Districts of New York: Arias's sole conviction was based on events which took place in the Bronx, and he was detained at John F. Kennedy airport in Queens when he returned to the United States on December 1, 1998. There is no indication that Arias had any connection whatsoever with Pennsylvania until he was sent there to the INS detention facility. The witnesses who testified at his 212(c) hearing all had to travel from New York. All the evidence produced at the hearing came from New York: his tax returns, license certificates, other paperwork, and the numerous letters written in his support. His current counsel is located in New York. Arias himself has lived in the Bronx, in the Southern District of New York, for over thirty years, and "should have his case decided under Second Circuit law." Mojica, 970 F. Supp. at 168. This forum is as convenient for the Government as the Eastern District of Pennsylvania would be, and this court is certainly familiar with the applicable laws. Venue is therefore proper in this District.

#### **IV. The Court Has Subject Matter Jurisdiction Over the Petition**

As set forth above, this Court's Order of May 3, 2000,

directed the Government to respond to Arias's petition by June 2, 2000, and that oral argument on the petition's merits would be held on June 7, 2000. The Government's response simply requested that consideration of the petition be deferred pending the resolution of Calcano-Martinez -- a request that has been denied for the reasons stated in Part I of this Opinion. Because the Government has not articulated any other reason for denying the petition, it would be appropriate to issue the writ on this basis alone. However, the Court is mindful of the Government's position that IIRIRA's amendments to the Act have eliminated habeas corpus jurisdiction in the federal district courts over petitions such as Arias's, which challenge an interpretation of the statute. Therefore, this jurisdictional question will be addressed notwithstanding the paucity of the submissions.<sup>7</sup>

Judicial review of orders of removal is now governed by the permanent provisions of IIRIRA codified at 8 U.S.C. § 1252. Under this section of the Act, "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having

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<sup>7</sup> Although Arias's counsel did address the issue of habeas jurisdiction, his submissions provide less assistance to the Court than those of the Government. The Memorandum of Law in Support of the Petition simply states that "[a]ll requirements for this court to exercise subject matter jurisdiction should be met," citing Pottinger v. Reno, 51 F. Supp.2d 349 (E.D.N.Y. 1999), and mistakenly citing it as a Southern District case. (Mem. L. in Supp. at 11.)

committed a criminal offense covered in section 1182(a)(2). . . ."  
Id. § 1252(a)(2)(C). Arias is such an alien. The question is whether this provision or similar provisions in the Act eliminate habeas jurisdiction in this Court over Arias's petition.

As indicated, the question is currently pending in the Second Circuit. It has already been answered by four other circuits, and a split has developed, with the Fifth and Eleventh Circuits holding that IIRIRA has eliminated habeas corpus jurisdiction in the federal district courts under 28 U.S.C. § 2241 over review of final orders of removal against aliens removable for commission of certain criminal offenses, see Max-George v. Reno, 205 F.3d 194, 198 (5th Cir. 2000); Richardson v. Reno, 180 F.3d 1311, 1313 (11th Cir. 1999), and the Third and Ninth Circuits holding that IIRIRA has not eliminated such jurisdiction, see Liang v. INS, 206 F.3d 308, 317 (3d Cir. 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1136 (9th Cir. 2000).

The Fifth and Eleventh Circuits held that § 1252(b)(9) was an "'unmistakable zipper clause' that 'channels judicial review' of INS 'decisions and actions' exclusively into the judicial review provided by INA," which was then interpreted as lying in the courts of appeals. Richardson, 180 F.3d at 1315 (quoting Reno v. American-Arab Anti-Discrimination Comm., 525 U.S.

471, 119 S. Ct. 936, 943 (1999)); see Max-George, 205 F.3d at 198 (§ 1252(b)(9) "clearly mandates" review limited to that provided by § 1252). The Fifth Circuit concluded that the "notwithstanding any other provision of law" phrase in § 1252(a)(2)(C) "clearly precludes habeas jurisdiction under 28 U.S.C. § 2241." Max-George, 205 F.3d at 198.

The Third and Ninth Circuits rejected this reasoning as contrary to Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). See Liang, 206 F.3d at 320 ("We continue to believe that had Congress intended to eliminate habeas jurisdiction under § 2241, it would have done so by making its intent explicit in the language of the statute."); Flores-Miramontes, 212 F.3d at 1136-38. The conclusion of the Third Circuit avoided the "serious constitutional problems that would arise" from a determination that the permanent rules stripped the district courts of habeas jurisdiction, because the Circuit's precedents had already established that direct review in the circuit court was unavailable. Liang, 206 F.3d at 320; see Flores-Miramontes, 212 F.3d at 1141-43 (interpretation "allows us to avoid the substantial constitutional question that would [otherwise] arise").

Second Circuit precedent would seem to compel it to follow the course of the Third and Ninth Circuits. In recent

decisions, the Second Circuit has held that although review in the court of appeals of final orders of removal of aliens on the grounds of having committed a criminal offense was no longer available under IIRIRA's transitional rules, that determination was made on the basis that review in the district court under habeas corpus was still available. See Henderson, 157 F.3d at 118; Jean-Baptiste v. Reno, 144 F.3d 212, 219 (2d Cir. 1998). Noting the relevance of the Suspension Clause, the Second Circuit stated in Jean-Baptiste and Henderson that "in the absence of language affirmatively and clearly eliminating habeas review, we presume Congress did not aim to bar federal courts' habeas jurisdiction pursuant to § 2241." Henderson, 157 F.3d at 118-19; Jean-Baptiste, 144 F.3d at 219 (citing Felker v. Turpin, 518 U.S. 651, 661 (1996); Ex parte Yerger, 75 U.S. (8 Wall) 85, 105 (1868)). "Repeals by implication of jurisdictional statutes (and particularly of the habeas statutes) are disfavored." Henderson, 157 F.3d at 119. "Finally, [to construe the Act in this manner] avoids the profound constitutional questions that would be presented under the Suspension Clause, Article III, the Due Process Clause, and the Equal Protection Clause if the statute were read to preclude all judicial review." Id. (citing Note, The Avoidance of Constitutional Questions and Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions, 111 Harv. L. Rev. 1578, 1579, 1589-90 (1998)); see also generally Gerald L.

Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961 (1998).

While Henderson and Jean-Baptiste were decided under IIRIRA's transitional rules, "the cases were largely decided on provisions common under both regimes." Pena-Rosario, 83 F. Supp.2d at 360. "[N]othing in IIRIRA . . . explicitly strips the district courts of their jurisdiction under 28 U.S.C. § 2241; it is not even mentioned." Id. The Pena-Rosario court continued:

The Second Circuit in Henderson was careful to point out that its reliance on habeas jurisdiction pursuant to § 2241 was necessary only because "the immigration laws [had] been interpreted to bar other forms of judicial review." Henderson, 157 F.3d at 122 n.15; see also id. at 119 n.9 ("[W]ere we to hold that direct review was available, so long as the review that remained was the equivalent of habeas, we would avoid all constitutional difficulties associated with a repeal of habeas."). There would be a great deal of appeal in having claims such as those brought by petitioners here adjudicated in the first instance in the court of appeals. They present pure questions of law; Congress clearly wants to expedite review over such cases; and it seems anomalous to afford these petitioners a double layer of review that would have been unavailable to them prior to the 1996 amendments and that remains unavailable to those being removed for other reasons. See Henderson, 157 F.3d at 119 n.9; LaGuerre, 164 F.3d at 1039-40.

It is not at all clear, however, by what means such direct review over statutory claims such as these could be had in the court of appeals. See generally Goncalves, 144 F.3d at 119 (discussing difficulty in finding basis other than § 2241 for judicial review of questions of statutory construction). IIRIRA does not provide for such direct review; in fact, it forbids it. The habeas statute, 28 U.S.C. § 2241, specifies that the writ may be

granted by "any circuit judge," not by a court of appeals generally, and Federal Rule of Appellate Procedure 22(a) states that any habeas petition made to a circuit judge "must be transferred to the appropriate district court." See Olaquez-Garcia v. INS, 152 F.3d 1005 (7th Cir. 1998) (Ripple, C.J., in chambers) (habeas petition directed to individual circuit judge transferred to district court pursuant to Fed. R. App. P. 22(a)); see also 17A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4268.1, at 488 (2d ed. 1988). The implied power of judicial review enunciated in Webster v. Doe, 486 U.S. 592, 601-04, 108 S. Ct. 2047, 100 L. Ed.2d 632 (1988), might provide a solution, but it is limited to "colorable constitutional claim[s]." The Second Circuit has said that repeal of habeas would be free of "constitutional difficulties" only if an alternative means of review were "equivalent" to habeas jurisdiction, and habeas jurisdiction extends to review of the Attorney General's "interpretation of the immigration laws," not merely to constitutional claims. Henderson, 157 F.3d at 119 n.9, 120.

The barriers to channeling statutory claims such as those raised by these petitioners directly to the court of appeals (and thus making habeas jurisdiction in the district court unnecessary) may be surmountable. But they have not been surmounted yet, and it is for the Second Circuit (if it is so inclined), not for this district court, to take on that task. See Cuevas v. INS, No. 99-CV-0048, 1999 WL 1270613, at \*6 (N.D.N.Y. Dec.29, 1999) (reluctantly finding habeas jurisdiction over such cases and stating that "[a]ny contrary result must come from the Second Circuit if and when it next revisits this issue"). Accordingly, there is presently no means for these petitioners to obtain judicial review of their claims other than by means of a habeas petition in this court. Accordingly, the Government's motions to dismiss for lack of subject matter jurisdiction are denied.

Id. at 361-62; see Santos-Gonzalez v. Reno, 93 F. Supp.2d 286, 290-91 (E.D.N.Y. 2000); Zqombic v. Farquharson, 89 F. Supp.2d 220, 229-30 (D. Conn. 2000); see also Pottinger v. Reno, 51 F. Supp.2d 349, 356 (E.D.N.Y. 1999); Maria v. McElroy, 68 F. Supp.2d 206, 215

(E.D.N.Y. 1999); Vasquez v. Reno, 97 F. Supp.2d 142, 147-48 (D. Mass. 2000).

For these reasons, it is concluded that IIRIRA did not eliminate this Court's habeas jurisdiction to consider the question of statutory interpretation raised in Arias's petition.

**V. IIRIRA Did Not Retroactively Repeal 212(c) Relief**

The BIA based its reversal of the IJ's grant of 212(c) relief to Arias on a determination that Congress intended IIRIRA to eliminate 212(c) relief for any alien whose removal proceedings commenced after April 1, 1997. Arias contends that this was an erroneous interpretation of the statute, and that 212(c) relief remains available for aliens when the act forming the basis for the removal proceeding occurred prior to April 1, 1997.

Former 212(c) was repealed by IIRIRA § 304 and replaced by a form of relief entitled "cancellation of removal," codified at 8 U.S.C. § 1229b. An alien who has been convicted of an aggravated felony is not eligible for cancellation of removal. See 8 U.S.C. § 1229b(a)(3). Arias's conviction for trafficking in a controlled substance in the fourth degree constitutes an aggravated felony

under the statute. See id. § 1101(a)(43)(B).

IIRIRA § 309(a) provides that IIRIRA § 304(a) shall take effect for any removal proceedings begun after April 1, 1997.

The Supreme Court has set forth the basic framework for addressing whether a statute applies retroactively:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Prods., 511 U.S. 244, 280 114 S. Ct. 1483, 128 L. Ed.2d 229 (1994).

Applying IIRIRA § 304 in this case "would clearly attach new legal consequences to actions taken before" the enactment of § 304. Santos-Gonzalez, 93 F. Supp.2d at 293; see Pena-Rosario, 83 F. Supp.2d at 362. The basis for Arias's removal is his 1978

guilty plea conviction, for which he received a sentence of two years' probation. As Santos-Gonzalez explains, "Section 304(a) . . . bars petitioner from receiving discretionary relief from deportation. It precludes all 'aggravated felons,' which includes petitioner, from relief, whereas the previously applicable provisions only precluded aggravated felons who had been imprisoned for five years or more." Santos-Gonzalez, 93 F. Supp.2d at 293. Under the former statutory regime, Arias would have been eligible for relief.

As several courts have held, IIRIRA § 304's elimination of the possibility of 212(c) relief is a new legal consequence triggering protections against retroactivity. See id.; Pena-Rosario, 83 F. Supp.2d at 362; Pottinger, 51 F. Supp.2d at 363; Mojica, 970 F. Supp. at 179; see also Goncalves v. Reno, 144 F.3d 110, 128 (1st Cir. 1998) (same conclusion with regard to AEDPA § 440(d), which similarly restricted discretionary relief).

Under Landgraf, in order for § 304(a) to apply retroactively, there must be a "clear congressional intent favoring such a result." Landgraf, 511 U.S. at 280; see also Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 946 (1997). No such clear intent was indicated by Congress when enacting § 304. The statute itself contains no explicit language

indicating that it will apply retroactively. See Santos-Gonzalez, 93 F. Supp.2d at 294. Section 309(a) provides that § 304 shall take effect on April 1, 1997, but "language that a statute 'shall take effect' on a certain date is in itself insufficient to effect retroactivity." Id. (citing Landgraf, 511 U.S. at 280). As Henderson noted in discussing AEDPA § 440(d), other sections of IIRIRA explicitly provide for retroactive application. See Santos-Gonzalez, 93 F. Supp.2d at 294 (citing examples); Henderson, 157 F.3d at 129. "Congress' use of explicitly retroactive language in [certain] parts of the bill and its failure to use any analogous language in the nearby and closely-related § 304 itself strongly indicate that Congress did not intend § 304 limitations on discretionary relief to apply retroactively." Santos-Gonzalez, 93 F. Supp.2d at 295 (citing Henderson, 157 F.3d at 129-30).

Several courts have concluded that "'the operative event for determining whether . . . the IIRIRA amendments should apply is the actual commission of the crime for which the petitioners now face deportation.'" Id. (quoting Dunbar v. INS, 64 F. Supp.2d 47, 54 (D. Conn. 1999)); see also Maria, 68 F. Supp.2d at 229. Whether the date of the commission of the crime is the appropriate date for determining applicability, however, is not necessary to resolve here. At the very least, a guilty plea would constitute the operative event. As Mojica spells out, an alien defendant's

decision to plead guilty could certainly be affected by the knowledge that the plea could deprive him of eligibility for relief from deportation. See Mojica, 970 F. Supp. at 175-80. Certainly Arias, who at the time of his arrest was expecting his first child, and who pled guilty at least in part because he would only receive probation, may well have stood trial, with its concomitant risk of prison time upon a jury verdict of guilty, had the consequences been known to him.

Thus, in accord with the authorities cited in the previous paragraphs, it is determined that IIRIRA did not retroactively eliminate 212(c) discretionary relief.

#### **VI. It Is Appropriate To Grant the Writ.**

The BIA reversed the IJ's grant of 212(c) relief to Arias on the grounds that 212(c) relief was not available to Arias. As set forth in the Section V of this Opinion, the BIA's ruling on this question of statutory interpretation was in error. It is this error which the writ addresses. The writ shall be granted and the decision of the IJ shall be restored.

#### **Conclusion**

For the reasons set forth above, the Writ shall issue within forty-eight hours from 5:00 p.m. on the date this Opinion is filed, to permit the Government to seek a stay before the Second Circuit Court of Appeals.

It is so ordered.

New York, NY  
July 31, 2000

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ROBERT W. SWEET  
U.S.D.J.